THE WEBB-KENYON DECISION.

ON JANUARY 8, 1917, the Supreme Court of the United States held that, since the passage by Congress of the Webb-Kenyon Act, the State of West Virginia has the power to forbid the importation of intoxicating liquors, even for personal use.[1] Thus, after twenty-eight years of agitation, the prohibitition interests have apparently been successful in securing an adjustment of jurisdiction which will enable the commonwealths to make their liquor laws absolutely effective. I say "apparently" because once before Congress granted the prohibition states what they asked for in the way of legislation,[2] and it was thought that the problem was solved; but the Supreme Court of the United States, by a strained interpretation [3] of a phrase in the law, deprived it of all effectiveness and further federal action was necessary. In the case just decided, however, the Supreme Court seems to go to the opposite extreme, it being interesting to note that both decisions were by the present Chief Justice.

A holding of such far-reaching import was, I venture, hardly expected by those who were acquainted with the constitutional doctrines involved, and in order to reach this conclusion, the Supreme Court had to ignore, perhaps because its theory was departed from, the case (Rhodes *v.* Iowa) which, after the passage of the Wilson Act, made further congressional action necessary, and had to treat ruthlessly, if not unfairly, its only decision on the Webb-Kenyon Act.[4] And furthermore, while the inquirer is compelled to infer what the *ratio decedendi* of the most recent holding is, the only available one seems to announce

[1] James Clark Distilling Co. *v.* Western Maryland Ry. Co. and The State of West Virginia; James Clark Distilling Company *v.* American Express Company and The State of West Virginia, 37 Sup. Ct. 180 (January 8, 1917). Mr. Justice Holmes and Mr. Justice Van Devanter dissented and Mr. Justice McReynolds concurred in the result.

[2] The Wilson Act (Act of August 8, 1890), 26 Stat. L. 313.

[3] Rhodes *v.* Iowa, 170 U. S. 412 (1898).

[4] Adams Express Co. *v.* Kentucky, 238 U. S. 190 (1915)

a new principle in American constitutional jurisprudence. To the case and the questions which it raises, this article will be devoted. First, a word as to the situation which made the Webb-Kenyon Act necessary.[4a]

I

Departing from the theory which it had announced in The License Cases,[5] the Supreme Court of the United States decided, first, that a state was powerless to prevent the importation of intoxicating liquor in the original packages,[6] and secondly, that the protection of interstate commerce extended until the packages had been sold by the consignee.[7] The Court announced that the

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[4a] Since this article was written the questions involved have apparently become academic through the passage by Congress of a rider to the Post Office Appropriation Bill (H. R. 19410, approved March 3, 1917; 64th Congress, 2nd Session. Public No. 380) excluding intoxicating liquor advertisements from the mails and providing further that:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid [a fine of not more than $1,000.00, or imprisonment for not more than six months, or both]: *Provided,* That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State: *Provided further,* That the Postmaster General is hereby authorized and directed to make public from time to time in suitable bulletins or public notices the names of States in which it is unlawful to advertise or solicit orders for such liquors."

This regulation would have gone into effect immediately upon approval by the President, but a House Joint Resolution (No. 392) made it non-effective until July 1, 1917 (64th Congress, 2nd Session, Public Resolution, No. 57). The exact scope cannot be determined in advance of judicial decisions. But, while, as I have said, the questions presented by the Webb-Kenyon Act have been made largely academic, they are of such constitutional interest that they still merit consideration.

[5] 5 How. 504 (1847). I have considered the more important points of the conflict between state and federal authority over intoxicating liquors in interstate commerce in previous papers (4 VA. LAW REV. 174, 288, 353, December, 1916, January, 1917, and February, 1917), but the essential facts are restated here in order to make abundantly clear the nature of the problem.

[6] Bowman *v.* Chicago, etc., Ry. Co., 125 U. S. 465 (1888).

[7] Leisy *v.* Hardin, 135 U. S. 100 (1890).

silence of Congress on the subject indicated its will that commerce should remain free, and that this must continue to be the case in the absence of "permission" for the states to act.[8] Congress, importuned for this "permission," passed the Wilson Act which provided that intoxicating liquors imported into a state should "upon arrival" within that state become subject to the legislation passed under its police power, to the same extent as if the liquors had been manufactured therein, and should not be exempt on account of remaining in original packages.[9] This enactment was held constitutional, the Court, however, discarding the theory of congressional permission, and deciding that "Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to the subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws dealing with such property." [10]

Several years later, however, the Supreme Court held that the words "upon arrival" referred to the consignee and not to state lines, and that local authority could not attach to imported packages until they reached the consignee.[11] His disposition of them could be regulated, and this was the sole effect of the Wilson Law so far as increased jurisdiction of the states was concerned.[12] With the local authority thus hampered by the protection which was afforded by the commerce clause of the Federal Constitution, there began a campaign for further legislation "permitting" the states to act. The suggested measures [13] were

[8] Bowman *v.* Chicago, etc., Ry. Co., *supra.*

[9] 26 Stat. L. 313.

[10] In re Rahrer, 140 U. S. 545, 561 (1891).

[11] Rhodes *v.* Iowa, *supra.*

[12] In Kirmyer *v.* Kansas, 236 U. S. 568 (1915), for example, a liquor dealer in Missouri, just across the state line, conducted his business and received orders in Missouri for delivery in Kansas, but the latter state was powerless to prevent this violation of its laws. See also, Louisville & Nashville Ry. Co. *v.* Cook Brewing Co., 223 U. S. 70 (1912) and authorities there cited.

[13] The Hepburn-Dolliver Bill (H. R. 4072, 58th Congress, 2nd Ses-

at first simply amendatory of the Wilson Law, making "upon arrival" apply to state lines and declaring that the imported packages should not be exempt by reason of being for personal use. In 1909, Congress did grant the states some relief by incorporating in the Penal Code three sections which forbade C. O. D. shipments, agency on the part of the carrier, false marking, or delivery to anyone other than the *bona fide* consignee;[14] but this by no means solved the problem and, in 1913, Congress passed the Webb-Kenyon Act which excluded from interstate commerce (without attaching a penalty) every shipment of intoxicating liquor "intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law" of the state of destination, the purpose being to invest the states with plenary authority over the shipments which were prohibited from interstate commerce.[15]

II

When the cases just decided were argued for the first time[16] there was a dispute as to whether the West Virginia statute[17] really did forbid the importation of intoxicating liquors for personal use, but it was subsequently amended so that the inhibition was certain.[18] In the margin of the Chief Justice's opinion only two sections of the law are set out. The first (section 7) makes it unlawful for any person to have any intoxicating liquors, even for personal use, at certain specified places—clubs, restaurants,

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sion); the Littlefield Bill (H. R. 13655, 59th Congress, 2nd Session). See 60th Congress, 1st Session, Senate Report 499, which considers a number of measures that had been sent to the Committee on the Judiciary for examination as to the constitutional questions involved.

[14] Sections 238, 239, 240.

[15] Act of March 1, 1913, 37 Stat. L. 699. The Act was vetoed by President Taft on the ground that it was an unconditional delegation of legislative authority to the states. See his message and the opinion of Attorney General Wickersham, 63d Congress, 1st Session, Senate Document 103.

[16] They were argued twice and passed once: Nos. 857 and 858, October Term, 1914; Nos. 383 and 384, October Term, 1915, and Nos. 75 and 76, October Term, 1916.

[17] Code 1913, c. 32A.

[18] Acts of 1915, c. 7. (Act of May 24, 1915, effective August 22, 1915).

public streets, etc. It is not, however, unlawful to possess liquors in one's own home and even there to give them away. The section further provides "that no common carrier for hire, nor other person, for hire or without hire, shall bring or carry into the state, or from one place to another within the state, intoxicating liquors for another, even when intended for personal use," except that a carrier may transport pure alcohol to druggists. Section 34 makes it "unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state," and the inhibition applies to liquors for personal use, and to interstate as well as intrastate shipments. The opinion of the Supreme Court does not, apparently, consider the other provisions of the law [19] and on the sections quoted from the amendment decides that the Distilling Company cannot compel the carrier to take a shipment of liquor destined for personal use and deliver it in Virginia by reason of the duty imposed upon it by the Act of Congress to Regulate Interstate Commerce [20]—the West Virginia regulations to the contrary being valid under the Webb-Kenyon Act and operative as to shipments from without the state.

The argument of the Chief Justice is divided into four propositions. First, he decided that since the relief sought is the permanent right to ship in the future, the West Virginia statute

[19] In the first part of the opinion Chief Justice White says:

"There was no express prohibition against the individual right to use intoxicants and none implied unless that result arose (a) from the prohibition in universal terms of all sales and purchases of liquor within the state, (b) from the clause providing that every delivery made in the state by a common or other carrier of the prohibited intoxicants should be considered as a consummation of a sale made in the state at the point of delivery, and (c) from the prohibitions which the statute contained against solicitations made to induce purchasers of liquor, and against the publication in the state of all circulars, advertisements, price lists, etc., which might tend to stimulate purchases of liquor."

For a consideration of the latter two provisions, upon which Chief Justice White does not enlarge, see my paper, "Unlawful Possession of Intoxicating Liquors and the Webb-Kenyon Act," 16 COL. LAW REV. 1, and West Virginia *v.* Adams Express Company, 219 Fed. 794 (1915). When the Circuit Court of Appeals for the Fourth Circuit decided this case, the amendment had not been passed.

[20] 26 Stat. L., 443.

must be considered as subsequently amended. Secondly, he held that the due process clause of the Fourteenth Amendment does not bar the West Virginia legislation since there goes along with the power to forbid manufacture and sale "full police authority to make it effective;" [21] but that the West Virginia law imposed a direct burden on interstate commerce had not been open to question since Leisy *v.* Hardin [22] and the state statute could be saved from repugnancy to the Constitution of the United States only if the Webb-Kenyon Act "has so regulated interstate commerce as to give the State the power to do what it did." Assuming, then, " the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibition contained in the West Virginia law?" This third proposition is the crux of the decision.

III

"As the state law," said the Chief Justice, "forbade the shipment into or transportation of liquor in the State whether from inside or out, and all receipt and possession of liquor so transported without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor intended to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such State, there would seem to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon law. If that law was valid, therefore, the state law was not repugnant to the commerce clause."

Such a summary statement is far from convincing, but it is the most complete one given to indicate the Supreme Court's conception of the consonance of the two laws. The "historical environment" of the Webb-Kenyon Act, a decision of the United States Supreme Court, and several decisions of state courts, had been resorted to in the argument, the Chief Justice

[21] "Whether the general authority includes the right to forbid individual use, we need not consider," he said. *Cf.*, 16 COL. LAW REV., 1, 10ff.

[22] 135 U. S. 100 (1890).

said, for the purpose of showing that such a view of the Webb-Kenyon Act had too wide an effect and that it should be held to include only "state prohibition in so far as they forbade the shipment, receipt, and possession of liquors for a forbidden use," and as the West Virginia regulations did not forbid use, the Webb-Kenyon Act could not apply and they were repugnant to the commerce clause. Assuming that the history of the Webb-Kenyon Act could be resorted to for its meaning, it was clear, the opinion said, that the only purpose of the measure "was to give effect to state prohibitions, not to compel the states to prohibit personal use. This was shown also by its legislative and judicial progenitors;" the enactment was "simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the Act is wholly inexplicable."

The precedent in the United States Supreme Court [23] is treated with remarkable brevity. "All that was decided in that case," said Chief Justice White, "was that as the court of last resort of Kentucky into which liquor had been shipped had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited." But what were the facts and decision in this case?

A statute of Kentucky [24] forbade the delivery of intoxicating liquor in any county or city where the sale had been forbidden.

[23] Adams Express Co. *v.* Kentucky, 238 U. S. 190 (1915).
[24] Kentucky Code, § 2569a.

Valid as to intrastate shipments,[25] this was invalid as to importations from without the state [26] and the question was whether it was made operative as to interstate transactions by the passage of the Webb-Kenyon Act. This statute, said Mr. Justice Day (with the majority in the case just decided), plainly indicated "the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the State into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold, or used in violation of any law of the State wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the State, to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution." [27]

The opinion set out at considerable length *dicta* from the decision of the Kentucky Court of Appeals [28] to the effect that the inalienable rights possessed by citizens "would be but an empty sound if the legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public." These quotations were to show that inasmuch as "the liquor was not to be used in violation of the laws of the State of Kentucky, as such laws are construed by the highest court of that State, the Webb-Kenyon Law has no application and no ef-

[25] See Adams Express Co. *v.* Commonwealth, 129 Ky. 420, 112 S. W. 577 (1908); Commonwealth *v.* Southern Ry. Co., 141 Ky. 353, 132 S. W. 408 (1910).

[26] Louisville & Nashville Ry. Co. *v.* Cook Brewing Co., *supra.*

[27] Adams Express Co. *v.* Kentucky, 238 U. S. 190, 199 (1915).

[28] Adams Express Co. *v.* Commonwealth, 154 Ky. 462, 157 S. W. 908 (1913).

fect to change the general rule that the States may not regulate commerce wholly interstate." [29] But since, in a later case [30] cited in this opinion, the Kentucky Court of Appeals held the section operative under the Webb-Kenyon Act to a shipment that was intended to be sold,[31] it would seem that the test was not the decision of the Kentucky Court that the state statute did not forbid personal use, but whether the shipment into the state was intended to violate a valid law of the state. And if a carrier could be punished, as I have said, for delivering an intrastate shipment *even for personal use,* it is difficult to see how in an interstate transaction this question of use was even remotely germane—unless the use itself is forbidden, and that is not done even by the West Virginia regulations. It seems to me, therefore, difficult if not impossible to reconcile these two decisions of the United States Supreme Court.

The earlier case approved the view, now apparently erroneous, that the Webb-Kenyon Act applied only when particular shipments of intoxicating liquor were to violate a law which the state had the power to pass under the Wilson Act, and that the jurisdiction of the state was thus enlarged only in "certain cases" as the title to the Webb-Kenyon Act specifically declared.[32] The state had no power to regulate receipt [33] and thus could not forbid shipments for personal use unless the use or possession was prohibited, in which cases the importations would be with intent to violate a state law which was valid independently of the Webb-Kenyon Act. The decision of Chief Justice White makes this construction untenable and seems to announce that the states now have equal authority as to inter- and intra-state shipments. But, as I have already said, the opinion is not ex-

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[29] Adams Express Co. *v.* Kentucky, 238 U. S. 190, 202 (1915).

[30] Adams Express Co. *v.* Commonwealth, 160 Ky. 66, 169 S. W. 603 (1914).

[31] Although the carrier could not be punished for the delivery if he acted "upon reasonable grounds in good faith after such investigation as ordinary care requires" and was misled. Adams Express Co. *v.* Commonwealth, 160 Ky. 66, 169 S. W. 603, 605 (1914).

[32] See my papers, "State Legislation under the Webb-Kenyon Act," 28 HARV. LAW REV. 225, and "Unlawful Possession of Intoxicating Liquors and the Webb-Kenyon Act," 16 COL. LAW REV. 1.

[33] Rhodes *v.* Iowa, *supra.*

actly clear as to the manner in which this unrestricted enlargement of authority has been brought about by a statute the purpose of which was to regulate interstate commerce in certain cases.[34] Two lines of reasoning seem to be possible.

IV

The first would be consistent with the view of the Webb-Kenyon Act which the Supreme Court took in the earlier case. The West Virginia law forbids any person in the state "to possess intoxicating liquors, received directly or indirectly from a common, or other carrier," and this applies to shipments for personal use.[35] The prohibition, however, is not directly aimed at possession and use—these being explicitly permitted in one's home—if the liquors are not received from a carrier. Now, it might well be argued that this is not a proper exercise of the police power and directly interferes with interstate commerce; or the view could be taken that, since the inhibition was directed against all transportation, intra- as well as inter-state, it was valid. The consignee, then, would have a right to receive ship-

[34] The only state case referred to in the opinion is Van Winkle *v.* State, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104 (1914), and concerning this the Chief Justice says:

"It is true in that case the state law prohibited shipment to and receipt of intoxicants in local-option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act prohibited the shipment of intoxicants 'only when liquor is intended to be used in violation of the law of the state,' and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

[35] Acts of 1915, c. 7, § 34.

ments; but according to the view which Chief Justice White declared untenable, the Webb-Kenyon Act would apply, for the shipments would be with the intent to be *possessed* in violation of a valid law of the state, federal protection would be taken away, receipt could be forbidden, and the carrier could be enjoined from delivering. But there is in the opinion no intimation that this is a correct theory.

On the contrary, in the fourth division of his opinion, considering the power of Congress to enact the Webb-Kenyon Act, Chief Justice White holds that Congress has by this enactment simply exercised a portion of its plenary power over intoxicating liquors in interstate commerce; it had authority to prohibit their movement altogether, but instead "simply regulated to the extent of permitting the prohibitions in one State to prevent the use of interstate commerce to ship liquor from another State." "It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State to another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply." This consideration, it would seem, might well lead to the conclusion that there had been a delegation of legislative authority to the states, since the repeal of the Webb-Kenyon Act would make the West Virginia statutes invalid; but the opinion preserves the fiction that Congress does not delegate its authority, but gives to the states "permission" to act. This would seem to be a distinction without a difference. And, in fine, the opinion holds that since the Webb-Kenyon Act excludes from interstate commerce a shipment intended to be received in violation of a state regulation, Congress has divested the receipt of its interstate commerce character, and has granted permission to the states to prevent receipt. To hold otherwise, the opinion says, would, since the power to regulate manifested in the Wilson Act and the Webb-Kenyon Law is "essentially identical," [36] require

[36] An inspection of the terms makes one doubt this statement. The argument as to the constitutionality of the Webb-Kenyon Act might well be more adequate. There are a number of interesting precedents which the opinion does not mention. These will be treated in a later paper.

the reversal of many opinions upholding the Wilson Act. But is this the case?

In Rhodes *v.* Iowa, Mr. Justice White said:[37]

> "On the other hand, the right to contract for the transportation of merchandise from one State into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State. The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not without the clearest implication be held to imply the purpose of subjecting to state laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is exressed. * * *"

Thus holding that "upon arrival" applied to the consignee, there was no necessity "to consider whether if the act of Congress had submitted the right to make interstate commerce shipments to state control it would be repugnant to the Constitution," the implication being that if the states were empowered to restrict importations for personal use, Congress would have unconditionally delegated its legislative authority. The correctness of this implication is supported by subsequent decisions, notably one where it was said:

> "The Court [Rhodes *v.* Iowa] declined to express an opinion as to the authority of Congress, under its power to regulate commerce, to delegate to the States the right to forbid the transportation of merchandise from one State to another."[38]

And it would seem, therefore, that far from a contrary decision overthrowing the adjudications under the Wilson Act, the recent opinion ignores the point raised in Rhodes *v.* Iowa. The question is not as to the constitutionality of the Webb-Kenyon Act, but as to its application; and while there is, of course, no merit in the argument pressed upon the court that the grant by Congress of permission in this case would open the door to the

[37] At p. 424.

[38] American Express Co. *v.* Iowa, 196 U. S. 133, 142 (1905).

subjection of other forms of interstate commerce to state control, still it would seem that the relinquishment of authority over such an essential part of interstate commerce as receipt ought not to be sanctioned on the basis of the inclusion in the federal law of the word "received" when the federal law is a positive prohibition of interstate commerce and designed to take away federal protection from particular shipments which are going to violate the law of the state. Whether valuable or pernicious, *delegatus non protest delegare* is a valid maxim of American constitutional jurisprudence [39] and it should not be violated by a fiction when another line of reasoning is open and an interpretation of the Webb-Kenyon Act can be made which will give the states ample power and have indisputable constitutional sanction.

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[39] 2 WILLOUGHBY, CONST. 1317.